Kentucky Environmental Quality Commission
Public Forum
Mountain Top Removal Mining

Meeting Minutes
September 28, 2005
Capitol Annex Room 131
Frankfort, Kentucky

EQC Commissioners Present	**Speakers/Representatives Present**
Lindell Ormsbee, Chair	Sean Alteri, Division of Air Quality
Betsy Bennett, Vice Chair	Dave Cooper, Kentuckians for the Commonwealth
Andrew Ernest	Amanda Moore, Kentuckians for the Commonwealth
Patty Wallace	Tom FitzGerald, Director, Kentucky Resource Council
Gordon Garner	Susan Bush, Commissioner, Dept. for Natural Resources
Commissioners not attending	Larry Adams, Dept. for Natural Resources
Laura Knoth	Dave Morgan, Director, Division of Water
Eugene Zick	Lee Anne Devine, Corps of Engineers
	Joe Blackburn and Sherry Wilson, EPA
EQC Staff Present	Steve Gardner, Engineering Consulting Service
Frances Kirchhoff, Exec. Secretary	Bill Caylor, President, Coal Association
Rebecca Farris, Policy Advisor	Don Graves, University of Kentucky
	Paul Rothman, Dept. for Natural Resources
	Mayor Bill Gorman, Mayor of Hazard

Mr. Lindell Ormsbee, Chair of the Environmental Quality Commission opened the meeting at 1:00 p.m. There were approximately 40 persons in the audience. The purpose for the meeting was to approve Air regulations and to gain a better understanding of coal mining by listening to presentations of all aspects and points of view. The first order of business was to approve the minutes of the July 27, 2005 meeting. The minutes were unanimously approved.

The Chair introduced Mr. Sean Alteri with the Division of Air Quality. Mr. Alteri gave a presentation concerning Air Regulation KAR51.150 NOx requirements for stationary internal combustion engines and 160 NOx requirements for large utility and industrial boilers. The Commission voted unanimously to recommend adoption of these regulations.

The first group of speakers represented the environmental community's perspective of coal mining. The first speaker in the group was Mr. Dave Cooper, a member of Kentuckians for the Commonwealth. Mr. Cooper showed the video *The Mountain Road Show.* The video depicted the people of Appalachia. Next was Ms. Amanda Moore, another member of Kentuckians for the Commonwealth. Ms. Moore gave an oration testimony of struggles encountered by people living in the Eastern Kentucky coal fields. The final speaker of this group was Mr. Tom FitzGerald, Director of the Kentucky

Resources Council. Mr. FitzGerald provided a legal point of view of mining issues. He spoke of his work in mining; past, present, and future.

Question/Answer discussion followed.
G. Garner
The long list, you are saying could be done under existing laws and authorities?

T. FitzGerald
Yes, and properly administered, the 404(b) 1 guidelines would require most of them to be done. I am not aware of any coal company held to task as those guidelines intend in terms of justifying why they have to place their waste in valleys and streams. The coal company is supposed to avoid, minimize, and compensate. The avoidance has all but been ignored. Properly held to the regulation, all these reforms could be done. It would benefit the workforce and the environment in Eastern Kentucky. We need to raise the bar to what Congress intended in 1977 which is excellence instead of mediocrity in mine planning and mine execution. The only one that would require a change is that Kentucky's stream buffer zone. It is inconsistent with the federal rule and has been for many years. It requires water protection only below the lowest two of the sediment pond placed in the stream below the valley fill.

G. Garner
I'm sure through the years you have challenged some of these things in the courts. What has been your experience with the courts?

T. FitzGerald
Realistically the problem is the limitations of our resources in terms of going on a case-by-case basis and requiring that the mines do a better job of planning. There have been instances where the agencies have held the companies to task to demonstrate avoidance and minimization. In fact, in one operation, the Corps of Engineers made them justify why they wanted to build a coal waste impoundment rather then other approaches to mine waste disposal. They shelved their plan to build an impoundment.

G. Garner
To what extent is litigation part of the solution?

T. FitzGerald
When Congress created the citizen's supervision of the act, they did so with the understanding that they are turning back to the states the mandatory programs that the states historically have been unable or unwilling to do effectively because of the inner state competition to do less regarding the regulation of the industry. It is a supplement but it is not intended to be the primary mechanism. Unfortunately, what litigation tends to do is use a lot of resources dealing with one situation. Achieving broad reforms through litigation is much more difficult. I would hope the agency would step up its efforts in a more systematic way which is more beneficial to the industry as well. It should have been no surprise to them to use streams for waste disposal because the law says you can't dispose of material under the 404 Program if the primary purpose is waste

disposal. That is straight forward prohibition yet for years it was ignored as was the application of the 404(b) guidelines.

A. Ernest
You mentioned mining practices that are mountaintop removal mining but not technically categorized as such, how does that happen?

T. FitzGerald
The variance for mountaintop removal (MTR) requires a much more rigorous showing before you are allowed to get a variance from the requirements that you otherwise restore to the original contour. What companies will typically do on a mining complex (if they can amass all the property rights to do it) is based on the economics (the overburden to coal ration) they will do a combination of deep contour cuts, auger mining, and some point removal (taking coal off of the ridge) but not technically call it mountaintop removal although the visual effect and the amount of spoil is very similar. Because of the elevation requirement of approximate original contour (AOC) has not been rigorously enforced by the states, you can look at a site that has an AOC variance (a site that allows for variation of the OVC) and one that does not and they look similar in terms of post mining. There is a lot more spoil material being offloaded from these mine sites than needs to be offloaded and you end up with—no matter what you call the mine—with a lot more material that should have been back stacked.

A. Ernest
You say there are two issues—one is operations that are improperly classified and therefore don't need a variance and two, is those that do have a variance but are not implementing the variance according to the strict requirements.

T. FitzGerald
It is one issue—it is the question of how you define and enforce AOC and the requirement that you restore the mine area in aspect and elevation to its original contour. The goal of the law was to minimize the off-site placement of spoil material, and they granted a narrow variance which is held to a rigorous standard. Unfortunately no one applies for that narrow variance with rigorous standard, because they can achieve the same result which is to blast and shove the spoil into end-dump fills rather than having to handle the material twice and put it back on the mine site. The problem with the multiplicity of fills is that as a mining engineer they are going to over-permit what they need. They do not want to have to come back to the agency and get amendments to the permits so they will over-estimate the amount of spoils needed and over-design the fills. The end-dump fills tend to take up a much larger footprint lowering the watershed than the constructed compacted fills. There is no reason why that cannot and should not be required—to do compacted constructed fills as was formerly the case rather then the end-dump durable rock fills.

A. Ernest
What would you consider, in a broad sense, the proportional contribution of regulatory loophole verses the non-enforcement issue?

T. FitzGerald
I don't want to seem too critical of the rank and file folks because I know they work long hours with short pay in an environment that does not encourage vigorous enforcement. We have made some progress but we accept a level of performance in both state and federal agencies—these agencies have the tools to really push minimization of impacts of aquatic resources and have not vigorously done so. In fact for years they had a nation-wide permit that basically said that if you get a permit from a mining agency, we will deem that to mean the equivalent of meeting the Clean Water Acts (CWA) requirements. And it is not. The CWA is much more rigorous in terms of demanding avoidance, requiring there is not a practical alternative to filling the public's water with waste material. You have the agencies with the best tools ignoring the authority as long as the mining company has a permit under a different law. Both agencies need to work in tandem. The scale of the impacts of MTR has captured the public's attention. These impacts attend any type of mining operation to a greater or lesser extent and it is, in fact, past time to ramp up the level of responsibility required from the companies and ultimately that cost will be passed along to the people who are consuming the electricity.

B. Caylor, Kentucky Coal Association
I respect what Mr. FitzGerald says and I respect a lot of the issues he mentioned, but I would like to ask Tom one question about in lieu fees. I know you said we ought to eliminate the in lieu fees for mitigation purposes, did you also say that we ought to use in lieu monies for sewer construction for mitigation purposes? Or water treatment? Water improvement?

T. FitzGerald
Thank you for giving me the opportunity to clarify this. What I said was the in lieu fee program has set an artificially low dollar figure on what it actually costs to restore aquatic resources that have been impacted by mining. The in lieu program is providing a way of facilitating the destruction of aquatic resources rather than encouraging other ways of mining/engineering that avoid the impacts to streams because it provides that you just pay the money in and you can get your permit allowing you to damage the resource for mitigation. The other forms of mitigation require that you actually catalogue the functions and values that are lost before the permit is issued. So instead of having to go out and restore wetlands, or provide what environmental benefit that is being held up, the agency is being compensated for the damage. They are paying it into a fund. The fund is accumulating interest but the fund is not being spent at the time of or before the time the damage is occurring. In lieu fees are not meeting the law's requirements for providing adequate, timely, and fully compensatory mitigation.

B. Caylor
There is an effort to use these in lieu fees as seed money for sewer projects especially on Thompson (?) Creek. We can take this money and leverage it into the $20 million at the Fish and Wildlife fund right now and we can leverage it into a $100 million or more for sewer infrastructure along Troutson (?) Creek that would eliminate thousands of straight pipe discharges. I had hoped that we would have some support for that effort. We are

not trying to evade paying our fair share but this money is an excellent opportunity to generate the moneys that are sorely needed as seed money to leverage grant money for sewer infrastructure.

L. Ormsbee
Ms. Moore, I'd like to ask you if your organization has any assessment of economic impacts of that region and if you had any idea of things that could help the economic development of that region?

A. Moore
Your question is 'as far as all of the economic consequences if KFTC has any suggestions' is that correct? Without getting into any specifics there should be more of a focus on the entire state government not just environmental branches. But in looking at Eastern Kentucky look at how we can get more diverse economic development there; not only diverse but sustainable economic development. When I say that, I mean something that is not going to destroy our natural resources and not going to leave us with a lot of sick workers at the end of the day. To do that, we need to look at the issues of education, leadership in Eastern Kentucky and transportation. We have all sorts of complex situations there. That goes back through generations and that is how we got where we are today. So I don't think there is an overnight solution to this but I do think we need to have more of a long term vision about what is going to happen there instead of continuing to focus on this one sector economy that is either boom or bust and is inevitably going to end.

The next group of speakers represented the State Agency's point of view. First to speak was Susan Bush, Commissioner of the Department for Natural Resources accompanied by Larry Adams from the office of Technical and Administrative Support. Ms. Bush and Mr. Adams gave a PowerPoint presentation of mountaintop removal. The definition of mountaintop mining as given by Ms. Bush is mining where the land is not returned to its OVC. What is required is the entire coal seam is mined in the mountain from crop line to crop line with no highwall remaining that would result in a plateau or gently rolling contour on top of the mountain once the coal seam was removed. The PowerPoint presentation showed examples of mining methods and post-mine land use. One main point Commissioner Bush wanted to make is the hollow fills are associated with mines other than mountaintop removal mining. Hollow fills are used even in deep mining. In mountaintop removal mining hollow fills are bigger but we do have hollow fills with all types of mines in Eastern Kentucky. The next speaker was Dr. David Morgan, Director of the Division of Water. Dr. Morgan gave an oral presentation and stated that the Division of Water has purview concerning mining in four areas. These responsibilities are in the 401 Water Quality Certification; in discharge permits; in enforcement of releases, spills, etc.; and in the Dam Safety Program.

Question/Answer discussion followed.
A. Ernest
Describe the permitting process for mountaintop removal and hollow fills.

S. Bush and Larry Adams
The permitting process is the same for all mine sites. The criteria for mountaintop removal has to be met and show that the post-mining land use is feasible. (Mr. Adams gave information concerning post-mine land use and what is required for mountaintop removal.) Typically on the back end when we are looking at the potential for release of a site, we will go out to insure that the infrastructure is in place, the utilities are in place, roads are in place, and construction has been initiated on the site. With regard to the prison facility, it is my understanding that it was something that was put into place on a previously mined site. I don't know that was contemplated at the time of permitting.

P. Wallace
Susan, did you say there are fewer mountaintop removal jobs going on right now over less area?

S. Bush
I just wanted to make the point that Dept. of Surface Mining is not issuing hundreds of mountaintop removal mine permits. There have been 3 in the last 5 years. And none so far this year.

P. Wallace
There is some mining going on in Lawrence County.

S. Bush
You could mine the exact same area—you take a mountain, you take the top off, you take the coal. The difference in MTR mining is you don't put much spoil material back on top. You leave the site as a flat plateau. During mining, it looks the same. It is the reclamation that is the difference.

P. Wallace
I have also noticed the number of coal trucks hauling coal on Highway 23. I counted 100 the other day. Some I could tell by looking at them they were over weight. I think we need to put scales on Highway 23.

S. Bush
I know there has been a concerted effort, although it is not under the purview of my agency to make sure those coal trucks are hauling within weight.

G. Garner
Tom FitzGerald said (and you inferred also) that the impacts of other permit approaches on a mining site could have the same impacts as MTR.

S. Bush
I think what Mr. FitzGerald was saying and I agree with him is that mountaintop removal operations are not the only ones that require hollow fills to store the excess spoil.

G. Garner
Through the years Office of Surface Mining (OSM) has had some "indigestion" with Kentucky's sincerity about enforcing mining permits. How would you characterize your current relationship with OSM?

S. Bush.
We have an excellent working relationship. In fact, we have an annual oversight of our program every year. Based on that report, I don't think you find that problem currently.

B. Bennett
Do you all have a publication of draft permits list like Kentucky Pollution and Discharge Elimination System (KPDES) does that is available to the public?

S. Bush.
They are published in local newspapers. Our surface mining information system is actually available to you online through the internet. There is a tremendous amount of information available electronically; location of oil and gas wells, underground deep mines, mine mapping initiatives, etc. My goal is to do a better job of getting information out to the general public.

B. Bennett
Concerning inspections of slurry ponds, is that still going on and is that information available publicly?

L. Adams
Yes, regular routine inspections are ongoing. What we have done because of the aftermath of the Martin County release was conduct an overview of all the impoundments in the state with the particular emphasis on those that had a higher potential for break-through that were in proximity to abandoned underground mine works. We did go out and inspect all 117 facilities. There were 40 or so that did have a moderate to high review and we did a much more in-depth review and we did complete that process and did have companies to come in and prepare prevention plans to eliminate that potential for breakthrough. In facilities where there was potential for break-through, we did require companies to come in and make revision and remedial measures to be taken to eliminate that.

B. Bennett
Is that list publicly available?

L. Adams
There is some concern about publicizing high hazard facilities with homeland security. We have not traditionally released that list of impoundments.

B. Bennett
Do folks who live around those impoundments know that they are high risk?

L. Adams
Those applications are advertised in the county newspapers. There are signs and markers at the permit boundaries. I would think they do know and are generally aware.

Bill Caylor commented that documentation of impoundments is listed on the web.

L. Ormsbee
Is the AOC requirement put on all permits?

L. Adams
Yes, except you have to have a variance granted to you not to return a mine site to AOC.

L. Ormsbee
And that is what will constitute a mountaintop removal variance?

L. Adams
If you took off the top of an entire mountain you need a variance. And also if you have what is called a steep slope variance.

L. Ormsbee
I think this is what we found with the Black Water Spill Taskforce. There is a perception that all of Eastern Kentucky is being mined with mountaintop removal. Based on the video I believe there is only 5 percent of the land being developed economically.

S. Bush
Keep in mind that was West Virginia. I don't have the number for Kentucky.

L. Ormsbee
It sounded to me like—based on previous comments—that before a site is released there has to be whatever economic development is going to be put in place at that site, there has to be demonstration that it is, in fact, going in.

S. Bush
That is a part of the permit and is available for public comment as well.

L. Ormsbee
If that is true, then any facility that is permitted as a mountaintop removal site would be 100 percent utilization of those sites for some type of economic development? I'm trying to understand.

S. Bush
What I can't speak to is mountaintop removal—agriculture is also post-mining land use. And what the landowner decides to do with it once they have achieved an agricultural post-mining land use, you might want to do something else with it once the bond is released and the Coal Company's responsibility is ended.

L. Ormsbee
I'm trying to understand where this perception of all these lands that are being left barren is coming from if, in fact, all mountaintop removal mining permits require some type of economic plan that has to be implemented and all permits in general have to satisfy the AOC requirement. There is a logical disconnect in my mind.

S. Bush
All permits have to have an approved post-mining land use. When you are in reclamation of a mine permit we do that in three phases. Once you get it all backfilled and graded that is the phase 1 release. Then we make sure the vegetation is going to stay there and post-mining land use. It is a three-phase reclamation. What we might be seeing is there may be some available lands for development that are no longer under bond that was mined back in 1977 or '78 and they are finished.

L. Ormsbee
The other issue related to that statistic for 2004, I think, was 222 fills with the average fill being 43 acres. That is a lot of material. If that is being taken off the mountain and put into the fills, I'm trying to understand how that is being restored to AOC.

S. Bush
It is a material balance. That is something that OSM and DSMRE are looking at anew--to be sure we are doing everything we can during the process to make sure if it can go back to AOC if the need is required. But keep in mind that you have got to maintain sediment control on that site and you might have on-bench ponds so you will need to leave a terrace for those on-bench ponds and the back fill is terraced for stability purposes and access; and that does not use as much material. Those calculations are also a part of the permit. Permits come to DSMRE in volumes. This data is there if you want to see it but it is just a material balance and stability.

L. Ormsbee
If I do the calculations, it looks like that is about 80 thousand acres of fill material and that had to come from somewhere. Is that being put in the valley fills of the mountains?

L. Adams
The numbers identified in the slide were actual watershed acreage not foot print of the fill.

L. Ormsbee
OK that explains it. Dr. Morgan, do we know how many miles of streams have been covered by these fills?

D. Morgan
I have seen figures for the combination of Pennsylvania, Virginia, West Virginia and Kentucky of 1,200 miles but I am not sure how much of those are in Kentucky.

G. Garner
How, under the Clean Water Act, can a stream just disappear?

D. Morgan
I think FitzGerald called it 'avoid, minimize, or compensate' is the way he looks at it. If there is a way to avoid it, they are supposed to avoid it. If they can't avoid it, then you minimize the impact, and if they can't avoid even in the minimized area, then the mediation is there. It is a law that it can be done as long as you mitigate to have it done which means you lose the top of a head water stream. Hopefully, you mitigate somewhere else, or you mitigate on site after the mining is done—to rebuild the stream--or you contribute to the in lieu fund that can be used in mitigation somewhere else.--those three things.

G. Garner
Basically your permit reviewers have to make a value judgment about alternatives?

D. Morgan
When it comes to use, the Corps actually makes the decision on whether or not a hollow fill is going to be there. We are very much involved in the 401 Water Quality Certification part in what kind of mitigation is going to eventually repay the state for the loss of that headwater stream.

G. Garner.
Basically, someone else is making the decision and then you are looking at it that the decision has been made and this section of stream is going to go away and what kind of mitigation can be done.

D. Morgan
Can we do it off site? Can we do it on-site? Do we use the in lieu? That is not just with mining. It happens with Transportation's projects and everything else that we are involved in concerning that process. I think--probably because of some of the mitigation requirements--that is one of the things that is driving the hollow fills to a smaller size. It is expensive and it is to lose those headwater streams.

G. Garner
Who is looking at the quantity issue, the amount of runoff for the change of the before and after conditions in terms of runoff and impacts on downstream flooding?

D. Morgan
I believe that is considered in the Surface Mining permit up front before that can be done.

L. Adams
That is correct. That is an aspect of the Surface Mining Control and Reclamation Act. (SMCRA) permitting process. It does require a pre-mining post-mining flood analysis to be sure there is proper retention of the sediment control basis to eliminate any increase in runoff.

S. Bush
I know it gets confusing, but to conduct a mining operation, you need more than one permit from more than one agency. There are a lot of us involved in this.

D. Morgan
They need the surface mining permit, the 404 permit, the 401 certification for fills put in any waters, and a KPDES permit for any discharges.

L. Ormsbee
I believe Mr. FitzGerald said that there are two agencies that have two permits and Division of Water turns over to surface mining the responsibility concerning the streams for the 401—maybe I miss understood that?

D. Morgan
(Dr. Morgan clarified with Susan Bush that the Division of Surface Mining did about 23,000 mine inspections last year.) I think what FitzGerald was saying there was that Division of Water (DOW) did several thousand inspections not on mining sites and if the DOW had to do all the water inspections, it would kill our folks. We have a Memorandum of Understanding (MOU) from 1983 that spells out how surfacing mining inspectors help DOW watch over the water quality requirements at these sites while they are doing their inspections. Through the MOU we empower them to cite the mining companies with respect to water loss. So in those cases, Department for Surface Mining is citing them. Now, when we get a release out there, and something is going on in that stream, we also get DOW inspectors out there. It is not abdication of the responsibility; it is a sharing of responsibility and use of resources.

L. Ormsbee
Is there any post-sampling in these fills by either agency for water quality; heavy metals, pH or anything like that? Is that a part of the general permit?

S. Bush
They have to do surface monitoring and KPDES monitoring for final bond release. The bond is not released if they are not in compliance.

B. Bennett
The process of the post-mine release process sounds good but when we went a couple of years ago to see the Martin County spill, I can't imagine what the post-mine land use is supposed to be. Do you know off the top of your head what it is supposed to look like some day?

S. Bush
No, I do not and that was probably more than one permit area.

L. Adams
There are several permits associated with that complex. That will become a permanent fill when it is finally reclaimed.

P. Wallace
We have been promised a lot on that reclaimed land! How many Wal-Marts do we need? How many airports do we need? We were promised the land for raising cattle and planting elder berries. They brought in the elk and deer. They clipped the duck's wings. The only thing I can see that would be successful is to stop taking the tops off the mountains.

A. Ernest
Who does the assessment of technical and economic feasibility of the post-mining use?

S. Bush
The Division of Permits approves the post-mining land use and that demonstration is a part of the approval of that package along with the mine plan.

A. Ernest.
So there is a technical and economic feasibility?

L. Adams
It is more of a technical feasibility review.

The Chair introduced the next set of speakers representing the federal government; Lee Anne Devine, Army Corps of Engineers, South Section Chief; and Joe Blackburn and Sherry Wilson, Federal Office of Surface Mining (OSM). The first to speak was Lee Ann Devine. Ms. Devine explained the course prospective on what the Corps' job is when it comes to mountaintop mining and hollow fills. She began with the Corps regulatory authority but spoke extensively on 404 authorizations for authority. Three basic types of streams that need permits from the Corps to place material in the waterways are perennial streams, intermittent streams and ephemeral streams. All streams have bed and bank but the definition of 'bed and bank' is not clear. Fills are considered valley fills, sediment ponds, and slurry impoundments. Two basic permits used by the Corps for mining are Nationwide Permit 21 (which expire every 5 years) and Individual Permits. Streams have a "quality" placed on them. A zero stream is the most disturbed stream, point five is an average stream and one is a least disturbed stream. The Corps works with coal companies to place fill where there is no impact to the stream, place fill to minimize the impact to a stream or mitigate the impact to the stream. Using a formula, a score known as the Ecological Integrity Unit is determined. Then to balance this out, mitigation has to be equal to or greater than the Ecological Integrity Unit of impact. The Ecological Integrity Unit is a calculation process that is a science-based way of looking at streams and helping the applicant make sure he has enough mitigation for the project. To develop the score or the Ecological Integrity Unit, the Corps uses the type of stream (intermittent, perennial, ephemera), a number representing the quality of the stream, (0 - most disturbed, .5 - average disturbance, 1 - least disturbed stream), the linear

footage of impact, and a matrix of fees. The matrix fees for ephemeral streams are the highest fee and right now it is $100 per linear foot. The Corps goes through the matrix, multiplies the stream type by the linear footage amount and the Ecological Integrity Unit is determined. The Corps has heard bad things about in lieu fees but it is a way for companies to get permits. It is not a cheap way to get a permit. The in lieu fee is very expensive.

Next to speak was Mr. Blackburn. Mr. Blackburn gave a PowerPoint presentation naming three aspects of mountaintop removal activities—national, regional and Kentucky-based. He talked about Kentucky activities and recent oversight studies including:

- RAM #135 and field directive #36 study on excess spoil fills
- Approximate original contour follow-up study
- 2005 fill inventory
- Slurry impoundments
- Blasting summit, and
- Fly rock investigations.

Question/Answer discussion followed.
L. Ormsbee
I had a question concerning the in lieu fee whether that was sufficient. What is the fee and how is it calculated? And that would be the maximum?

L. Devine
Yes, for an excellent quality perennial stream we would multiply it by 3. So for example an excellent stream and you are impacting 1,000 linear feet stream you will get 3,000 linear feet of excellent perennial stream times $100 to calculate the in lieu fee to be paid.

L. Ormsbee
What percent of the projects opt for the in lieu fee vs. the other alternatives?

L. Devine
In the beginning, quite a few went that way, but I think the coal companies found it to be too expensive that they can do the mitigation on site for free in a way. The coal companies want to do it themselves. They save money when they do it on site or on adjacent properties. We don't have many that want to do in lieu fee.

L. Ormsbee
What is the current state balance of the in lieu fees?

L. Devine
I don't know. Someone said $20 million, but I don't know.

L. Ormsbee
How much of that has been utilized or what percent has been utilized?

L. Devine
I don't know. I'd say the majority has been ear-marked.

L. Ormsbee
Are they mostly economic projects? Mr. Caylor made the comment that some of those funds could be used for sewer projects.

L. Devine
The in lieu fees right now will never be used for sewer projects. The in lieu fees are for projects to get back the streams that are lost. Doing sewer projects and getting rid of straight pipes in Eastern Kentucky with in lieu fees still would not help get the streams back.

L. Ormsbee
I think that Mr. FitzGerald alluded to the fact that different districts might enforce regulations differently. Could you comment on that?

L. Devine
I really can't say how other districts do things.

A. Ernest
Concerning the in lieu fees, there is always the possibility that there will be a net reduction of these waters in the U.S. The objective of the in lieu fee process is to provide a formalized monitory version of litigation banking. When the process was initiated was there an assessment of what the potential impact in terms of total river kilometers value judgment between the cost of mile vs. mitigation banking projects?

L. Devine
Mitigation banking was not available back then. In lieu fees was a new business that had just come out on the federal register as an opportunity to do, and we had an interest in it as well as the coal companies. In mitigation banking we have to have a private entity to pursue those. We can not do the mitigation banks ourselves. There were some in lieu fees already started in surrounding states, and we did talk with them to try and get the base amount to charge--$100 per linear foot. We are now trying to get some projects on the books to see, and if we have to bump up the fee we can say, here is why.

L. Ormsbee
Relative to the assessments done to the streams for coming up with the evaluation is that done just on a project by project basis or do you have a general assessment that provides that?

L. Devine
All projects are site by site. We visit every site and assess the equality and the impact. A site assessment is done as a part of the application process. Coal companies do them or have a consultant do them and we spot check them.

L. Ormsbee
Have you found that they are consistent?

L. Devine
Yes, they are consistent. I don't know if it is because they know we are going to check them or what but they are good.

S. Smith
There are three in lieu banks—one at MSD, one at Fish and Wildlife, and one in Northern Kentucky. The balance of that is $26 million.

The next set of speakers represented the coal companies and coal association. The first speaker was Mr. Bill Caylor, President of the Kentucky Coal Association. Mr. Caylor gave a PowerPoint presentation focusing on mountaintop removal mining—myths and facts. Mr. Caylor said that once mined and reconstructed, mountainous land is made better because the land is flat and can be used for economic purposes and wildlife habitat is improved. The next speaker was Steve Gardner, Engineering Consulting Services, Inc. Mr. Gardner gave an oral presentation about mining from an engineering point of view. Mr. Gardner believes that mountaintop removal mining is a value-added process and mining is a temporary use of the land. Along with Mr. Caylor and Mr. Gardner were engineering students from the University of Kentucky.

Question/Answer discussion followed.
P. Wallace
I wish that the engineering students just arriving could have been present to see the video shown by Mr. Dave Cooper. I would hope that these young students would want to see both sides of mining.

S. Gardner
I believe true environmentalist are people who work to improve the earth. I believe that is what we have done and I have dedicated my career to that.

B. Caylor
There is just a difference in opinion of what is positive and what is not. I firmly believe that we are doing the right thing, where you believe you are doing the right thing, so it is just a difference of opinion.

L. Ormsbee
We are trying to get all viewpoints here today.

G. Garner
What we have is a cumulative impact of what we do today. Ms. Wallace tried to help us to understand that a mountain gone can not be put back. And how many mountains are we willing to let go of? According to your presentation I believe you said that we should give up 6.8 percent of our mountains. Is that what you were saying when you stated that

mountaintop removal is only 6.8 percent? Will coal companies be satisfied with that? Can we use that as a regulatory limit?

B. Caylor
That was a federal study and I would like to take more than 6.8 percent because I believe that man can improve the environment for the future generations. I think you are going to see the areas that have been mountaintop mined are going to be the economic hub of Appalachia in the future. It will open up this land for its children and its children's children to use this land. It won't happen overnight but it will happen. I am convinced of that.

S. Gardner
That was EPA's Environmental Impact Statement (EIS) which identified central Appalachian region only 7 percent has the ability to be mined. Doesn't mean it will be. There are a lot of areas set aside. We are looking at private property and we are looking at…..

G. Garner
And it's not all located in the same place. It is not distributed. The impacts in some counties are much greater than others. The decision-making process is not very logical. Decisions are being made with economic development and coal prices mainly as the driver. That is why this dialogue is important and why I don't believe it is going to go away until we find a better way to make those kinds of decision and it is not just compliance with permits that we are talking about. There are other issues in play--not just whether we are complying with the current regulations.

B. Caylor
Mr. Garner, it is not the coal companies driving this. It is the landowners—the people that actually own the land—they want the level land. Coal companies can put it back any way the landowners want.

G. Garner
No, it is the coal trains from Kentucky to the boats to go somewhere else.

B. Caylor
And there are $3.6 billion coming back to Kentucky. Not just to the coal fields, but to all of Kentucky and it benefits our state greatly.

P. Wallace
How much coal to date has left Eastern Kentucky--how much has left the state--how much has been devoted to education, medical care, conservation and other public services in Eastern Kentucky? Our schools are the worst, our roads are the worst, every where there has been coal industry, there is the most poverty. As far as the permits and what percent is going to be mountaintop removal---Darlene Wilson had a good term that coal companies suffer from 'creeping permititis.' They get one permit and they just extend it and keep going and going.

L. Ormsbee
Are you saying that EPA estimates that the maximum area that can be mined is 6.8 percent? Is that the upper limit?

B. Caylor
Yes, old and new forever. When I went up in a helicopter and viewed Eastern Kentucky at a distance, all you can see is undisturbed, unimpacted mountains.

G. Garner
Is that why Ned Breathitt back in the 1960s after going to Washington, D.C. decided to become Governor? Because we needed to do something about strip mining in Kentucky? I think it is ridiculous to say that the scale at which we are doing things that you can hardly notice mountaintop removal mining!

B. Caylor
All I know, Mr. Garner, is what I see with my own eyes when I go up in a helicopter and fly around. I would invite you to do that. Don't take someone else's statements as factual. I've been up. I've seen it with my own eyes.

P. Wallace
I did fly up over the Big Sandy River and all I saw was dirt. We flew through Martin County, it was dirt. All you could see was dirt as if a B8 or B9 or whatever it is called, came in and just went crazy. The people down there don't realize and don't know what is above them. We saw the slurry ponds and everything was dirt and the next thing we knew we were landing in Hazard—more dirt.

L. Ormsbee
There seems to be from this discussion a pretty big disagreement.

B. Caylor
That is a pretty big difference of opinion.

Mr. Bill Gorman, Mayor of Hazard
Mr. Chairman, I will take the podium in a little while but I'd like to address this lady that keeps referring to Hazard as dirt. The thing about it is this. In Hazard, Kentucky the governor came to town to honor one of the ten top high schools in Kentucky. I plan to present to you in my presentation, some facts that you have not heard.

L. Ormsbee
Thank you Mayor Gorman, we will be with you shortly.

From this discussion, there seems to be, not just a different perspective, but there seems to be a disagreement on the facts. I am just thinking that there has to be a way to hopefully get to the facts. I am hoping out of this meeting today and the meeting tomorrow in Prestonsburg, that one of the objectives that EQC would achieve is to get a

better understanding or a consensus on what are the factual issues. One of the factual issues in big dispute here is how much area, how much land is actually being impacted by mountaintop removal. I think there is a perception from both personal observations that seems to be pretty extensive. We have testimony from one that saw extensive mining and we have other testimony that says it is consequential and we just have a handful of permits. I think that those are two wide variations. There should be some consensus. I think we need to work that out and hopefully that type of factual information can not be in dispute but be looked at and quantified. Another point and one question that still puzzles me is the definition of what constitutes a mountaintop removal mining. That terminology seems to be used in a certain sense to mean something and there is a public perception that other types of mining perhaps might fall under that description. Relative to the perceived impact, I don't think it matters what it is called—normal mining or mountaintop removal mining. But that is another issue that I think EQC needs to get a handle on. We were told that there are only three or four permits for mountaintop removal mining, but yet from the testimony, there seems to be more extensive leveling of mine sites. I would hope that at this type of setting we would be able to clarify the facts. Another issue is one about vegetation. There seems to be "other vegetation" occurring on these sites. In Mr. Cooper's video, we were seeing trees and other types of vegetation. Bringing all of you together today has made us look for the facts and hopefully, we can bring some clarity to these issues.

B. Bennett
I believe that Mr. Larry Adams is the permit person for surface mining. Maybe we could ask him to get a factual total of how many acres are currently being mined in the way we are looking at or how many have been mined in that way (reclaimed as flat, not AOC).

L. Adams
I think many of the areas that were pictured in some of the presentations were earlier mining. They may not have been permitted and mined by today's standards. Mountaintop removal is very much a defined regulatory term where the area is left flat. Mountaintop mining is more a collegial term that encompasses any mine you might see on the side of a mountain, on the upper most reaches of a mountain and also includes mining that restores approximate original contour. If I recall correctly, the EPA mountaintop mining EIS—that 6.7 percent figure—I believe that encompasses all aspects of surface mining. Is that correct Steve (Gardner)?

S. Gardner
That is correct—not just mountaintop removal; that is all surface impacts. Mountaintop removal would be a very small portion of the percentage. Of the 12 billion acre study area, only about 7 percent was identified as mountaintop removal—which is the complete removal of a coal seam from one elevation and above.

B. Caylor
The 404 Task Force will be doing a couple of sites tomorrow and I am sure they would welcome you to tag along. I believe KFTC wants to show them a bad site and we will show them a 15 year-old reclaimed site. Feel free to come along.

L. Ormsbee
We have been invited to attend that. Let me ask one more question. Mr. Caylor, you said that you feel the streams are basically the same. I'd have a slight difference of opinion on that. The water as far as quantity may be the same, but I think the quality is obviously changed and I think one of the more important things with these ephemeral streams or headwater streams is they frequently are sources of biota and biology. You made some assertions that these drainage channels with the rock and so on are basically going to provide the same type of habitat and same type of biological integrity. That would be an interesting research project for someone. If you are making these assertions then there should be documentation.

S. Gardner
I think we will be seeing that in the future. That is a very new issue that scientists have had to face.

B. Caylor
If I may point out the streams issue has really evolved over the last five years. We did not use to worry with ephemeral streams. We worked with perennial streams and intermittent. These streams were not jurisdictional waters even for Corps of Engineers but have evolved very quickly over the last five years.

A. Ernest
I don't think it is so much a difference of opinion as it is a difference of understanding of perception of what a successful mountaintop removal mining operation is. Obviously the environmental protection and the residents have their own perceptions, so being as heavily engineered as you are, let us know how you would characterize a successful mountaintop removal mining project. And then follow that up with what is a quantitative assessment of the percentage of projects in Kentucky that involve mountaintop removal mining that you would consider to be successful.

B. Caylor
This would hinge on the function of time--if you expect that to occur within 5 years or 15 years---and it would depend on what the post-mining land use would be.

S. Gardner
You were asking that as a request and I think in the technical papers that I have included with this package, we address those issues. This is an ongoing personal research project that no one is paying me to do that we are putting together. My personal interest in tracking this issue and trying to address some of those questions are contained in this package.

A. Ernest
My question is if you are going to make an assessment or an assurance that mountain top removal mining is successful or is working, it would be useful to have some quantitative numbers to back that up. From a private citizen's perspective, access to quantitative

information is probably limited and the ability to characterize that information is limited so it would be useful to all of us if we can get a feel for what the facts are. A quicker factoid is if we had 10 post mining closures or post mining usage implementations, how many of those do you think have been successful and by what standards? Then we can compare those standards with Ms. Wallace's standards and then we will really start to see what the issue is. It is really an issue of perception and what we believe individually to be a successful operation. I think if we can get to the facts, we will be a lot further along to closing this out.

L. Ormsbee
Do you have any research studies that support the contention that you are getting this top soil generation in such short order as you have indicated?

B. Caylor
My research was a shovel and four random places where I dug into the ground to see what was there.

L. Ormsbee
I think there is a perception that if you put rock out there that it is not going to decompose into soil in a couple of years. That is a technical issue that if you believe is accurate; I think it would be helpful to have scientific proof data to support that.

S. Gardner
That is actually a part of the permitting process. You have to have physical and chemical testing of the material that goes back as the topsoil medium. In general in Eastern Kentucky, it is very difficult to salvage topsoil because it is so extremely thin to begin with. We are recreating top soils in many areas. Apart from the permitting process, the Department of Geological Survey, and the UK Forestry Department has done extensive research.

P. Wallace
If you have five inches of topsoil in 15 years you either had to haul it in or it washed off the side of the mountain because there are no trees or anything left after mountaintop removal mining to decompose.

The next set of speakers represented the community and economic development of the coal field region of Eastern Kentucky. The first to speak was Dr. Don Graves with the University of Kentucky and Paul Rothman, with the Department for Natural Resources. Dr. Graves gave a PowerPoint presentation of the research done by the University of Kentucky's Department of Forestry. This reforestation initiative was set into motion after a public forum held by the Environmental Quality Commission in February 1996. The Commission, through its Common Sense Initiative, submitted a resolution to then Cabinet Secretary, James E. Bickford and Governor Paul E. Patton. The Resolution asked that the EPPC Cabinet, formally known as the Natural Resources and Environmental Protection Cabinet, the Department of Surface Mining Reclamation and Enforcement and others work together to develop measures that would enhance tree

planting as a viable reclamation option thus promoting a more productive post mining land use while minimizing reclamation costs. Working together with other state and federal agencies, neighboring colleges and universities in the Appalachian region has shown that trees can be a profitable post mining land use and a sustainable natural resource for the Commonwealth. Research over the past 10 years shows that with some rather minor changes in mining practices, trees can live, even thrive, on reclaimed mine sites. The final speaker was Honorable Bill Gorman. Mayor Gorman gave an oral presentation naming businesses in Perry County that have been built on former mountaintop removal sites and the economic growth it has meant for Hazard to have flat land.

Mr. Ormsbee thanked the speakers and audience for attending the forum. Mr. Ormsbee noted that EQC would consider these comments and draft its findings and recommendations in the near future.

Other Business
A very short business meeting was held. Acting Director Scott Smith gave an update on the status of the new director as well as budget matters and the Prestonsburg meeting the following day.

With no further business, the meeting adjourned at 6:30 p.m.

Signed Lindell Ormsbee, Chair

Date